



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2021/0171/FP/P

Before
Judge Stephen Cragg Q.C.

Mr Roger Creedon
Ms Jean Nelson

**Determined, by consent, on written evidence and submissions
Considered on the papers on 16 September 2021.**

Between

Acute Recruitment Limited

Appellant

and

The Information Commissioner

Respondents

DECISION AND REASONS

DECISION

1. The appeal is dismissed.

MODE OF HEARING

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
3. The Tribunal considered a bundle of evidence comprising pages 56 pages and appeal/submissions from the parties.

BACKGROUND TO THE APPEAL

4. The Appellant is a data controller within the meaning of the Data Protection Act 2018¹ ("DPA"). As such, it is required to comply with the Data Protection (Charges and Information) Regulations 2018 ("the Regulations")². The Commissioner has assessed the Appellant as a "tier 2" organisation, and the Appellant's fee was £60 which it is accepted was due by 3 December 2020.
5. The Appellant failed to pay to the Commissioner the Data Protection Fee required by regulation 2 (2) of the Regulations by 3 December 2020.
6. The Commissioner served a Notice of Intent by letter dated 3 June 2021 and, in the absence of any representations from the Appellant, served a Penalty Notice of £600 by post and email on 4 July 2021.
7. The Appellant has appealed to this Tribunal on the basis that its default was an innocent mistake and asks that the penalty be revoked by the Tribunal.

APPEAL TO THE TRIBUNAL

¹ <http://www.legislation.gov.uk/ukpga/2018/12/contents>

²The Regulations were made under s. 137 DPA. See <http://www.legislation.gov.uk/uksi/2018/480/contents/made>

8. The Appellant's Notice of Appeal dated 5 July 2021. It explains that the company had moved address and had a redirection service in place with Royal Mail which had come to an end. The Appellant stated that although the penalty notice had been received, the Notice of Intent was not. It is said that access to the previous address was no longer possible because it was in a gated complex with fob access only. Covid is also said to have been a hindrance, but this is not expanded upon by the Appellant. It is said that if the Notice of Intent had been received the £60 charge would have been paid with immediate effect. The Appellant, it is accepted, has now paid the charge, and says she will continue to do so.

9. The Commissioner's Response dated 19 August 2021 resists the appeal. She submits that the Penalty regime has been established by Parliament and that there is no requirement to issue reminders (although reminders were in fact been sent in this case). It is accepted that the Appellant's failure to comply with the Regulations was due to an oversight, but it is submitted that the imposition of a Penalty was appropriate in all the circumstances. The Commissioner explains as follows:-

22. The Commissioner sent an e-mailed reminder to the Appellant to the address listed on the Commissioner's register (info@acute-recruitment.co.uk) on 22 October 2020. That e-mail reminded the Appellant that the charge was due by 3 December 2020, that the Commissioner had calculated the sum as £60 and gave further information as to payment. The email address used by the Commissioner matches that provided on the Notice of Appeal. The Appellant does not deny that this e-mail was received.

23. A subsequent reminder letter was sent by the Commissioner to the Appellant on 12 November 2020 to the address listed on the Commissioner's register and setting out the same information, making clear that the charge was due to expire. The Appellant denies that this letter was received. The address used by the Commissioner was, and remains, the Appellant's registered office address.

24. On expiry of the registration, the Commissioner sent a further reminder e-mail on 12 March 2021 to the e-mail address listed on the Commissioner's register. The e-mail confirmed that the registration had expired and requested that the Appellant pay the charge of £60 within 14 days. Again, the Appellant does not deny that this email was received.

25. The Commissioner had accordingly made efforts to remind the Appellant of its legal duties by e-mail and by post prior to the relevant date of 3 December 2020 and after it. It was not obliged to do more. It is the responsibility of the controller to ensure that correspondence is properly read, that (if this arises) the regulator has appropriate contact information and that legal obligations are complied with.

26. Following no payment having been received, the Commissioner sent a Notice of Intent under Schedule 16 to the DPA, along with a covering letter dated 3 June 2021, by post to the Appellant [appended to this Response]. That covering letter was headed, in bold type, “NOTICE OF INTENTION TO ISSUE A PENALTY NOTICE UNDER THE DATA PROTECTION (CHARGES AND INFORMATION) REGULATIONS 2018” and made clear that it emanated from the Commissioner, as well as what it concerned.

27. No representations or other response was received by the Commissioner.

THE LAW

10.Regulation 2 of the Regulations requires a data controller to pay an annual charge to the Information Commissioner (unless their data processing is exempt).

11.A breach of the Regulations is a matter falling under s. 149 (5) of the DPA. Section 155 (1) of the DPA provides that the Information Commissioner may serve a Penalty Notice on a person who breaches their duties under the Regulations. S. 158 of the DPA requires the Information Commissioner to set a fixed penalty for such a breach, which she has done in her publicly available *Regulatory Action Policy*³. The specified penalty for a tier 2 organisation which breached regulation 2 is £600.

12.Schedule 16 to the DPA makes provision as to the procedure for serving Penalty Notices, including at paragraph 2 a requirement that the Commissioner gives a Notice of Intent before a Penalty Notice is issued:-

(1) Before giving a person a penalty notice, the Commissioner must, by written notice (a “notice of intent”) inform the person that the Commissioner intends to give a penalty notice.

(2) The Commissioner may not give a penalty notice to a person in reliance on a notice of intent after the end of the period of 6 months beginning when the notice of intent is given, subject to sub-paragraph (3).

(3) The period for giving a penalty notice to a person may be extended by agreement between the Commissioner and the person.

³ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

13. Paragraph 3 of Schedule 16 sets out what a Notice of Intent must include. It must give the person to whom it is sent an opportunity to make written or oral representations about the intended Penalty Notice, and must allow at least 21 days for these to be made. If representations are made within the specified time, the Commissioner must consider them before deciding whether to issue a Penalty Notice (paragraph 4).
14. Section 141 of the DPA sets out various options by which the Commissioner may serve a notice required under the DPA:-

(1) This section applies in relation to a notice authorised or required by this Act to be given to a person by the Commissioner.

(2) The notice may be given to an individual—

(a) by delivering it to the individual,

(b) by sending it to the individual by post addressed to the individual at his or her usual or last-known place of residence or business, or

(c) by leaving it for the individual at that place.

(3) The notice may be given to a body corporate or unincorporate—

(a) by sending it by post to the proper officer of the body at its principal office, or

(b) by addressing it to the proper officer of the body and leaving it at that office.

(4) ...

(5) The notice may be given to the person by other means, including by electronic means, with the person's consent.

(6) In this section—

“principal office”, in relation to a registered company, means its registered office;

“proper officer”, in relation to any body, means the secretary or other executive officer charged with the conduct of its general affairs;

“registered company” means a company registered under the enactments relating to companies for the time being in force in the United Kingdom.

(7) This section is without prejudice to any other lawful method of giving a notice.

15. An appeal against a Penalty Notice is brought under s. 162(1)(d) DPA. S.162(3) DPA provides that “A person who is given a penalty notice or a penalty variation notice may appeal to the Tribunal against the amount of the penalty specified in the notice, whether or not the person appeals against the notice.”

16. The jurisdiction of the Tribunal is established by s. 163 DPA, as follows:-

(1) Subsections (2) to (4) apply where a person appeals to the Tribunal under section 162(1) or (3).

(2) The Tribunal may review any determination of fact on which the notice or decision against which the appeal is brought was based.

(3) If the Tribunal considers—

(a) that the notice or decision against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice or decision involved an exercise of discretion by the Commissioner, that the Commissioner ought to have exercised the discretion differently,

the Tribunal must allow the appeal or substitute another notice or decision which the Commissioner could have given or made.

(4) Otherwise, the Tribunal must dismiss the appeal.

17. For the Notice under appeal to have been brought ‘in accordance with the law’, the Commissioner must have complied with the requirements of Schedule 16 of the DPA, including the requirements relating to the timing of the Notice of Intent. In relation to a Penalty Notice issued for failure to comply with the Regulations, no other statutory pre-conditions are set. It is sufficient simply to establish that there was a failure to comply with the Regulations. There is no separate and additional requirement to establish, for example, that the contravention was serious or that there was a likelihood of damage or distress to data subjects.

18. We note that the burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

19. It is increasingly common for the General Regulatory Chamber to determine appeals against financial penalties imposed by civil regulators. In appeals against Fixed Penalty Notices issued by the Pensions Regulator, tribunal judges have frequently adopted the approach of asking whether a defaulting Appellant has a “reasonable excuse” for their

default, notwithstanding the fact that this concept is not expressly referred to in the legislation. This approach was approved by the *Upper Tribunal in The Pensions Regulator v Strathmore Medical Practice* [2018] UKUT 104 (AAC).⁴

DISCUSSION

20. There appears to be little dispute between the parties as to the facts in this case. The Appellant accepts that it received the Penalty Notice, but not the Notice of Intent.

21. The Appellant accepts that it was in breach of its legal obligations under the Regulations on the relevant date.

22. The Appellant explains that it had moved address on 27 March 2020, did not have access to its previous office, and only had in place a mail redirection service which had expired before the Notice of Intent was sent.

23. However, the Appellant has not explained how it failed to receive the Notice of Intent, but did receive the mailed and emailed Penalty Notice some weeks later. The Appellant has also not made reference to the email reminders sent by the Commissioner both prior to and after the due date of 3 December 2020, and prior to the sending of the Notice of Intent. As the Commissioner notes, the email reminders were sent to the same email address as that included in the Notice of Appeal and, in the absence of an explanation, the Tribunal assumes that those reminder emails were received by the Appellant

24. We note that it is the Appellant's responsibility to ensure both that the relevant fee is paid to the Commissioner, and that the contact details held by the Commissioner are up to date. This would include notifying the Commissioner when the Appellant's registered address changed. The Commissioner's response (of 19 August 2021) states that the contact details have still not been updated (although the email address appears to be unchanged).

25.

⁴ https://assets.publishing.service.gov.uk/media/5acf131ee5274a76be66c11a/MISC_3112_2017-00.pdf

26. In this case the Commissioner served a Notice of Intent in accordance with section 141 (3) (c) of the DPA, by sending it by post to the Appellant company at its registered address. The Appellant is unable to produce positive evidence that the Notice of Intent was not received and has not explained why it took no notice of previous email reminders.
27. We note that the Appellant has dealt quickly to remedy the situation once in receipt of the Penalty Notice, by payment of the registration fee on 6 July 2021, and states that it has previously been in compliance with its DPA responsibilities.
28. In our view this is not an appropriate case to revoke the Penalty Notice where the Appellant has (a) failed to take steps to ensure it receives correspondence from the Commissioner; and (b) not explained why it did not act on email reminders sent by the Commissioner.
29. We do have the power to vary the amount of the penalty. However, the Appellant has not made any representations on reduction. Bearing in mind the factors set out in the previous paragraph, this does not seem to us to be an appropriate case to reduce the fixed penalty amount of £600. In reaching this conclusion we bear in mind that the fixed penalty regime encourages compliance with the law, aims to ensure the Commissioner's work is properly funded, and reflects a well-established historical system of registration and payment.
30. On that basis this appeal is dismissed and the Penalty Notice in the sum of £600 stands.

JUDGE STEPHEN CRAGG QC

DATE: 17 September 2021